

**Comments to the Federal Trade Commission**  
**From the National Consumers League, Consumer Action, and Consumer Federation of**  
**America, and the Center for Democracy and Technology**  
**Regarding Prerecorded Message EBR Telemarketing, Project No. R411001**  
**January 7, 2005**

The National Consumers League (NCL)<sup>1</sup>, Consumer Action (CA)<sup>2</sup>, Consumer Federation of America (CFA)<sup>3</sup>, and the Center for Democracy and Technology (CDT)<sup>4</sup>, have long worked to advocate for more effective protection from unwanted telephone solicitations. The Federal Trade Commission's (FTC) actions in recent years to create a National Do Not Call Registry (DNC) and strengthen other provisions of the Telemarketing Sales Rule (TSR)<sup>5</sup> – actions that our organizations strongly supported – have clearly benefited consumers. Approximately 81 million numbers are now in the DNC.<sup>6</sup> Therefore, we view the FTC's new proposal regarding the use of prerecorded telemarketing solicitations with some alarm as a step backwards, leading to more unwanted sales calls.

In addition, we believe that there is absolutely no justification for changing the abandoned call standard from three percent per day to three percent per 30-day period.

**Prerecorded Telemarketing Solicitations**

The TSR does not currently address the use of prerecorded messages except for Section 310.4 (b) (4) (iii), which provides a safe harbor from the requirement that a sales representative be available to speak with the person answering the phone within two seconds of that person's greeting if the seller or telemarketer promptly plays a recorded message stating the seller's name and telephone number. It does not say that the recorded message may be used in lieu of a "live" salesperson to make the solicitation in that instance or in any other outbound calling situations. The FTC now proposes to explicitly permit the use of prerecorded telemarketing solicitations as long as there is an established business relationship between the seller and consumer and certain other obligations are met.

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<sup>1</sup> NCL was founded in 1899 to protect and promote social and economic justice for consumer and workers in the United States and abroad.

<sup>2</sup> Since 1971 CA has served consumers nationwide through complaint referral, education, and advocacy.

<sup>3</sup> Established in 1968, CFA is a nonprofit association of 300 consumer groups that seeks to advance the consumer interest through research, advocacy, and education.

<sup>4</sup> CDT is an independent, nonprofit public interest organization advocating privacy, democratic values and constitutional liberties in the digital age.

<sup>5</sup> 16 CFR Part 310.

<sup>6</sup> <http://www.ftc.gov/opa/2004/12/dnc31day.htm>, accessed January 7, 2005.

### ***Prerecorded Messages or Predictive Dialers – is that the Right Question?***

The FTC frames this proposal by positing that it is less intrusive to receive recorded messages than live calls made with predictive dialers that might result in “hang ups” or “dead air,” as if consumers should have to choose between the two. We have previously argued that the FTC should prohibit the use of predictive dialers because, as the FTC acknowledges, they inevitably result in some hang-ups and dead air. Instead, the FTC set standards for their use in an attempt to limit, though not eliminate, consumer alarm and aggravation.

Would the new proposal reduce the use of predictive dialers, and thus the number of consumers aggrieved by their use? We don’t know, and we don’t think that anyone is in a position to make that promise on behalf of the diverse array of covered entities.

Would consumers be less annoyed and upset by finding sales pitches left on their answering machines than by running to the phone and finding no one there? We don’t know, but it’s a pretty safe bet that neither choice would get as many votes as “no sales calls.”

At any rate, these are not the appropriate questions to ask in order to evaluate the wisdom of this proposal. The key question is whether it is likely to lead to more unwanted telemarketing solicitations.

### ***Opening Pandora’s Box***

Our main concern is the potential for more unwanted telemarketing solicitations if this form of telemarketing is encouraged. Though, as the FTC has pointed out, Federal Communications Commission (FCC) regulations already allow prerecorded messages if the consumer has a preexisting business relationship with the seller or has given written consent<sup>7</sup>, telemarketers have not yet seized this option. As with the petitioner in this case, Voice Mail Broadcasting Corporation (VMBC), they may be unsure how the FTC and FCC regulations jive and how to comply with the various requirements in the TSR if they use prerecorded sales messages.

They may also be mindful of the fact that when Congress enacted the Telephone Consumer Protection Act,<sup>8</sup> it clearly expressed strong concerns about the use of prerecorded telemarketing solicitations, citing them as a nuisance and an invasion of privacy. The fact that the FCC provided for their use, mistakenly in our view, does not mean that the FTC should.

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<sup>7</sup> 47 CFR Section 64.1200 (a)(1)(iv).

<sup>8</sup> 102 PL 243, 105 Stat. 2394 (1991).

If the FTC provides a clear path forward, it is fair to assume that many telemarketers will take it. And if prerecorded messages provide a far less costly alternative to outbound calling using live salespeople, this could dramatically increase the number of telemarketing calls with which consumers must contend.

### ***Time-Consuming Handling of Messages***

Consumers would have to listen to the messages in order to determine how to deal with them. No matter whether the messages are stored on an answering machine or in voice mail, or listened to in real time, this would be time-consuming, especially if these types of calls increase.

### ***Tying Up Phone Lines***

The FCC rules prohibit making prerecorded calls to emergency phone lines, hospital rooms, homes for the aged and similar facilities<sup>9</sup> because they tie up the phone lines, making it impossible to call out when the message is still coming in. We believe that consumers should be able to use their phones to call out from their homes whenever they need or want to. Increasing the use of prerecorded messages would increase the potential for tying up consumers' lines. These messages would also use up answering machine memory, perhaps preventing consumers from receiving subsequent personal messages.

### ***Limiting the Use of Prerecorded Messages to EBRs***

The FTC proposes to allow the use of prerecorded messages only if there is an established business relationship between the seller and the recipient, citing the claim that the potential for abuse would be checked because the messages would only be delivered to "existing customers."<sup>10</sup> However, the definition of established business relationship in the TSR is quite broad; it includes not only consumers who bought something from the seller in the last 18 months (whether by phone or some other means) but also consumers who merely inquired about something within the last three months and never made a purchase.<sup>11</sup> Many consumers are unaware that their telephone numbers can be captured by ANI or obtained from a variety of other sources for marketing purposes. They might be very surprised to receive prerecorded sales solicitations, especially on the basis of simply making an inquiry some months previously.

In discussions about this proposal, examples of prerecorded calls have sometimes been offered that we would call "transactional" in nature – information from an airline about a change

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<sup>9</sup> 47 CFR Section 64.1200 (a)(1)(i)-(ii)

<sup>10</sup> Page 7, Notice of Proposed Rulemaking.

<sup>11</sup> 16 CFR Part 310 Section 310.2 (n)(1)-(2)

in flight schedule, notice from a manufacturer about a product recall, information about an ongoing account. We have no problem with these, and there are probably no constraints on them anyway, since they would not fall under the definition of telemarketing.

We are always left to wonder, if there is really an established business relationship, why can't the seller simply ask the consumer for permission to call with new offers? If prerecorded telemarketing solicitations would be as attractive to some consumers as VMBC claims, those consumers will gladly opt-in. There is no reason to oblige all consumers to receive them.

### ***Exercising Company-Specific Do-Not-Call Rights***

In addition to the requirement of established business relationships, the FTC proposes that there would have to be a mechanism for consumers to assert their "Do Not Call" rights during the prerecorded messages. For instance, a consumer could follow a prompt to hit a specific number on the telephone keypad to be connected to a live company representative.

However, there is no obligation in the proposed rule for the recorded message to include any mention of asserting one's "Do Not Call" rights; indeed, it could simply say, "For more information about this offer, press 5." In the absence of a specific disclosure requirement, consumers who receive these prerecorded messages will not know that they are being given an opportunity to opt-out or how to do so.

Nor is there any obligation for the company representative, once connected to the consumer, to raise the subject of opting out of future calls. On the contrary, the representative's job is to make a sale.

Consumers could even open themselves up for more telemarketing calls under this proposal. If in responding to the message they fail to make a "Do Not Call" request, but rather inquire about the offer or make a purchase, they will be fair game for further calls for an additional three to 18 months.

The FTC created the DNC precisely because the company-specific opt-out procedure was not sufficient to give many consumers the degree of privacy protection that they wanted. It places a significant burden on consumers to know about their rights, assert them, and keep track of their no-call requests. It is unrealistic to believe that the company-specific approach will work any better in this instance than it has in general.

### ***Availability of Company Representatives***

The FTC proposal seems to assume that when the consumer presses the number to speak to a live company representative, one will be readily available. It is unclear what happens if that is not the case. Will the consumer get dead air? Be put on hold with recorded music? Be hung up on? How can we be confident that that will be an adequate number of representatives to handle these inbound calls at all times, when telemarketers can't ensure that salespeople are always available to speak to consumers in outbound calls?

### **Conclusion regarding Prerecorded Telemarketing Solicitations**

The FTC has garnered well-deserved praise from consumer and privacy advocates and the public at large for the actions that it has taken to give people more effective protection from unwanted telemarketing solicitations. The benefits have been immediate and clear to consumers. Ask any group of people, and those whose numbers are in the DNC will happily confirm that they are receiving far fewer sales calls.

We are concerned that this proposal, if implemented, would foster an increase in telemarketing solicitations. Because the prerecorded solicitations would be allowed if there is an established business relationship, consumers whose numbers are in the DNC would not be shielded from them; in fact, those consumers who most strongly object to receiving telemarketing calls will likely bear the brunt of a new onslaught of calls. If consumers are not aware of their company-specific "Do Not Call" rights (and from our conversations with consumers, we believe few are) they will not assert those rights, even if there is an opportunity to do so. As a result, their time and telephones will be increasingly tied up, and the privacy they have gained will be eroded.

Therefore, after careful consideration, we urge the FTC not to adopt this proposal.

### **Changing the Abandoned Call Standard**

We share the concerns that the FTC expressed about changing the abandoned call standard from the current three percent per day<sup>12</sup> to three percent per 30-day period. Averaging out the abandoned call rate over a longer period of time could result in certain groups of consumers being disproportionately impacted. As the FTC points out, predictive dialers could be set for different abandonment rates based on geographic, demographic, or other criteria. This is unfair, especially in light of the fear and confusion that call abandonment causes. The per-day

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<sup>12</sup> 16 CFR Part 310 Section 310.4 (b)(4)(i).

measure reduces the potential for disproportionate impact on consumers, whether intentional or inadvertent.

Furthermore, there does not appear to be any necessity or justification for shifting from a per-day standard. In the absence of any compelling reason that would outweigh the potential inequity and harm to consumers, we urge the FTC to reject this proposal.

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